Supreme Court, U.S.
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No. 93-1041

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 199__

JAY JOHNSON,

Petitioner,

vs.

DODGE COUNTY
DEPARTMENT OF HUMAN SERVICES,
et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, guardian ad litem Gail D. Baker, is dissatisfied with Petitioner's statement of the questions presented. Petitioner has not complied with Rule 14.1(a) of the Rules of the Supreme Court of the United States by his inclusion of three introductory paragraphs. Those paragraphs are argumentative and contain misstatements of facts. Respondent is not dissatisfied with the form of the four enumerated questions presented. However, the facts in this case do not give rise to Petitioner's Questions Presented as legitimate justiciable federal questions, as will be discussed hereinafter.

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BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Minnesota Supreme Court's order denying petitioner's petition for review.

JURISDICTION

Petitioner claims this court has jurisdiction to grant the requested writ of certiorari to review the decision of the Minnesota Supreme Court entered on September 30, 1993 pursuant to 28 U.S.C. 1257. As will be discussed hereinafter, Petitioner has not established jurisdiction as required by Rule 10.1 and Rule 14.1.(h) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Material Facts

Petitioner, Jay Johnson, is the natural father of the child, H.J., the subject to this proceeding. Petitioner met and married Lucy Teberg in September, 1976. Prior to the marriage, Petitioner was aware that she had a history of mental illness with previous hospitalization. Two children were born of the marriage: J.J. born May 28, 1979, and H.J. born September 6, 1982.

(Petitioner's Appendix A-4, hereinafter PA-4)

When first in Minnesota, the Johnsons lived with another family, the Jacobsons, for three turbulent and stressful months, during which time the Jacobsons observed punishment of the Johnson children by their parents which constituted physical and emotional abuse, withholding and restricting the types and amounts of food, and bizarre and strange behavior by Petitioner toward his wife and children which led Mr. Jacobson to ask the Johnsons to leave. During the next six months, the stress level in the Johnson home escalated. Members of the Johnsons' church had grave concerns about the safety of the children, as the evidence of physical and emotional abuse became more serious, observing nicks on the children's noses, hearing screaming, seeing the children hiding from their father, and

listening to the children reporting other abuse. The Johnsons asked several members of the church to care for their children. Finally, in September, 1989, when the stress, chaos and violence apparently overwhelmed them, the Johnsons placed their two girls with Ron and Linda Christenson. (PA-6,7)

In September of 1989, the Dodge County Department of Human Services, hereinafter referred to as "DCDHS", became involved with the Johnson family, responding to several reports of neglect and abuse. (PA-7) DCDHS personnel interviewed J.J. and H.J. Both children reported the abuse that they experienced at the hands of their parents. Specifically, H.J. reported, that: her mom and dad were "fighting and arguing"; and hit each other; hurt her by hitting her all over her body with a closed fist for every little reason; her dad spanked her two times a week

with her pants down using a closed fist; that when she cried her dad pinned her down on the floor and covered her mouth so that she could not breathe; when she kicked him he covered her mouth even more; her dad almost killed J.J. once; he sat on J.J.'s leg and almost broke it; if either child tried to help the other one they both "got it"; one time she and J.J. lived with another family for about one year; they did not get much to eat and she never ate supper; for breakfast or lunch she ate fruits or vegetables, and hardly ever drank milk; and, that when sick, she went to a "different kind of doctor" and had either a hot or cold foot bath. (PA 7-9)

DCDHS personnel also spoke privately with the Christensons who reported that Petitioner and Lucy Johnson were having financial problems, creating a great deal of stress between them; had "WWIII fights" over

everything, even when talking on the telephone with J.J. and H.J.; Lucy Johnson had been in a mental hospital for about one year, so another family took care of J.J. and H.J.; when the children saw their father, they hid on the floor of the car, sucked their thumbs, and curled up in a fetal position; H.J. wore diapers to bed because she wet her pants every night; and that J.J. had gained eight pounds since she started staying at their home two weeks before. (PA-9)

The social worker who handled the case reported that the children were at intermediate or high levels of risk and that intervention was necessary because of excessive physical punishment, inappropriate nourishment, placement of the children outside of the home, marital stress and discord, possible mental illness of one or both parents, and frequent moves. A

voluntary placement agreement was signed by Petitioner and Lucy Johnson on September 22, 1989, and a protective service plan was prepared on October 9, 1989. Placement continued with the Christensons until they expressed reluctance to continue to care for the Johnson children. (PA-10) On October 13, 1989, the children were placed in foster care with the Respondents, Mark Dulaney and Diane Dulaney, (hereinafter Dulaneys). Petitioner was notified of the foster placement. Petitioner left the state of Minnesota at that time (PA-11), and, except for the month of February, 1990 (PA-147), and his attendance at some court hearings, did not return to Minnesota until July 7, 1991. (PA-28).

The Petitioner and Lucy Johnson were Seventh Day Adventists. DCDHS and the Dulaneys made efforts to learn about, comply with, and accede to, various Seventh Day

Adventist dietary, educational, and other religious practices, including vegetarian meals, J.J.'s continued attendance at a Seventh Day Adventist school, and attendance of the children at Sabbath services on Saturdays. (PA-11, 12)

On November 9, 1989, a Child in Need of Protective Services Petition (hereinafter CHIPS) was filed against both parents. (PA-13) Lucy Johnson admitted the petition's allegations at a hearing on November 15, 1989. At a hearing on February 15, 1990, Petitioner admitted two of the petition's three allegations, which set forth Minnesota Statutes Section 260.015, Subd. 2a(2) and (8). He admitted spanking the children with a wooden spoon, and on at least one occasion, breaking the spoon while doing so. He also admitted covering the children's noses and mouths with his hand

while spanking them so they could not breath or cry. (PA-14).

After finding the children in need of protective services following the Petitioner's and Lucy Johnson's admissions, the court ordered continued foster placement, evaluations of the parents and children and supervised visitation. The children and parents were evaluated and specific counseling and treatment were recommended for both.

A dispositional hearing was held on April 23, 1990, at which Petitioner was ordered to participate in individual and group therapy for parents who had abused their children and attend parenting classes. The court also ordered the transfer of J.J. to public school; procedures for H.J. to have surgery, if necessary, because Petitioner opposed those requests; and that

the children continue counseling. (PA-18, 19)

Following the hearing, Petitioner returned to Hawaii and began attending parenting classes and individual therapy through the "Alternatives to Violence" program. (PA-19) Court reports from June through November, 1990, indicated that Petitioner was making no progress in the program and counseling. In December, 1990, Petitioner discontinued participation in the program and counseling citing "religious differences." (PA-19-22)

Based on the reports of no progress by Petitioner in his counseling, the court at review hearings in July and October, 1990, continued the terms of the previous orders, specifically finding as to Petitioner that "even though he was attending counseling, he had yet to deal with the issues of abuse"

and "the girls had a strained relationship with their father." (PA-20-22)

During the first six months that the children were residing with the Dulaneys, Lucy Johnson separated from the Petitioner. After Lucy Johnson separated from Petitioner, she changed her dietary habits, began to eat previously restricted foods, and introduced those foods to H.J. and J.J. during visitations. (PA-16) In October, 1990, Lucy Johnson commenced a dissolution proceeding and requested custody of J.J. and H.J. (PA-22)

In February, 1991, the children visited Petitioner in Hawaii with Respondent, Diane Dulaney, supervising the visit. During the visit, Petitioner called DCDHS requesting that the children be allowed to remain with him in Hawaii. DCDHS refused to allow them to stay, but assured Petitioner that when back in Minnesota, an assessment would be

done on the current situation and what was best for the children. (PA-24, 25) Upon their return to Minnesota, the children told their therapist, Marcia Guertin, the guardian ad litem, social workers, and the Dulaneys that they had enjoyed Hawaii, but did not want to live there with their father. (PA-26)

Despite requests to Hawaiian Child Protective Services and Petitioner's counselor, Reverend Roberts, for reports on Petitioner, no written reports were received before the next scheduled review hearing on April 17, 1991. (PA-26, 27). The Dodge County social worker spoke with Reverend Roberts by telephone prior to the hearing. Reverend Roberts indicated Petitioner was not ready to parent his children, and that he would not be ready until he took ownership for their situation, and let others provide input and guidance in his

life. Therefore, the court again continued the terms of the previous court orders with Reverend Roberts as Petitioner's new counselor and requested progress reports for the next review hearing. (PA-27)

The decree of dissolution of Lucy Johnson and Petitioner's marriage was signed by Judge Roger S. Plunkett on July 3, 1991 with Judgment entered on July 8, 1991. (PA-28) On July 6, 1991, a car accident occurred killing Lucy Johnson and J.J. H.J. sustained a closed head injury, cuts, bruises, and a broken right leg requiring surgery. (PA-28) Petitioner returned from Hawaii on July 7, and stated that he would be taking H.J. back to Hawaii to live with him when she was released from the hospital. (PA-28, 29) DCDHS set up daily visits for Petitioner with H.J., but H.J. resisted or refused to visit with her father. (PA-30) H.J. exhibited further oppositional and

self-destructive behavior, and was extremely afraid she would have to leave the Dulaneys. (PA-42) By letter dated July 15, 1991, Marcia Guertin, strongly recommended continued placement with the Dulaneys because of H.J.'s intense psychological bond with them, stating that to sever the relationship then would be detrimental to H.J.'s emotional well being and her integration and healing from the deaths of her mother and sister. (PA-30) In an August 19, 1991 Order, the court denied Petitioner's requested dismissal of the CHIPS Petition and that H.J. be allowed to return to Hawaii with him and ordered DCDHS to set up a reasonable and liberal visitation plan with a thirty (30) day review, indicating that the court was considering transferring jurisdiction to Hawaii to facilitate reunification of H.J. with her father. (PA-33) On August 19,

1991, the Dulaneys commenced a custody proceeding to obtain legal and physical custody of H.J. (PA-35)

Visitation continued to be a problem. DCDHS set up extensive visitation opportunities, but H.J. continued to resist or refuse visitation. (PA-33) The guardian ad litem, social workers, H.J.'s therapist, and the Dulaneys discussed and encouraged visitation, making multiple attempts to modify and change the visits so that H.J. would go. (PA-33, 34)

By Order of the trial court dated September 12, 1991, the CHIPS and custody cases were consolidated and the court ordered a home study and joint counseling for Petitioner and H.J. (PA-36) Petitioner and H.J. commenced joint counseling with Marcia Guertin on October 9, 1991. Nine one hour sessions of joint counseling did not improve the relationship between Petitioner

and H.J. Petitioner continued to be unable to empathize with H.J., refused to accept and/or understand H.J.'s attachment to the Dulaneys, or reflect back on what H.J. was thinking or feeling. (PA-36, 37)

Visitation deteriorated further in the fall and winter of 1991 with H.J. refusing over one-half of the visits. H.J.'s behavior regressed with increased acting out, and a resumption of bedwetting after each visit or joint counseling session. Finally it was recommended that H.J. go to respite care on court ordered visitation weekends if she refused to visit with Petitioner, but she still continued to refuse some scheduled visits. H.J.'s last visit with Petitioner prior to the commencement of the trial occurred on the weekend of February 15, 1992. H.J. reported Petitioner again used physical force when she did not obey his whim. (PA-37-39)

The court held a full hearing (referred to as the "trial" herein) which lasted sixteen (16) days. At the trial Ms. Guertin testified that Petitioner was not a fit or suitable parent, because of his past behavior, personality characteristics, and inability to empathize with H.J. Ms. Guertin concluded that it would actually be detrimental to place H.J. in her father's care, and that extraordinary circumstances existed which required the placement of H.J. with a third party non-biological parent. (PA-44-47) Ms. Guertin (PA-46), Dr. William Friedrich (PA-57), who did psychological and parenting evaluations on all parties, this respondent (PA-70), three Dodge County social workers (PA-710), and H.J.'s maternal grandfather (PA-95), all testified in support of the Dulaneys request to be granted custody of H.J. The court made lengthy and very specific findings of fact,

prepared a detailed memorandum of law, and concluded that Petitioner was not a fit or suitable parent, as contemplated by Minnesota law, to have custody of his remaining minor daughter, H.J., and that it was in H.J.'s best interest that permanent legal and physical custody be granted to the Dulaneys, subject to reasonable and liberal visitation of Petitioner under such supervision and at such times as deemed appropriate by DCDHS upon consultation with the Dulaneys. The CHIPS proceeding was dismissed, and Petitioner's child support obligation was reaffirmed with the exact amount reserved for later determination. (PA-102)

By order dated November 3, 1992 the court denied Petitioner's requests that future visitation be unsupervised, DCDHS prepare a reunification plan, and that specific summer visitation be set for H.J.

with her grandparents in Hawaii. (PA-139-140)

Petitioner appealed the trial court's decision to the Minnesota Court of Appeals, which affirmed the decision in an unpublished opinion dated July 16, 1993. The appellate court found that the trial court did not abuse its discretion in refusing to transfer jurisdiction to Hawaii, in failing to dismiss the CHIPS Petition prior to trial on Petitioner's allegation that DCDHS did not comply with state provisions regarding administrative review, and finding that the periodic court reviews substituted for administrative review required in involuntary foster placements. Further, the court found that Petitioner was precluded from contesting the propriety of the placement on ethnic heritage grounds due to his failure to appeal the disposition order, that the trial court did not abuse

its discretion in consolidating the custody and CHIPS proceedings, and that there was no error in the findings that Petitioner was unfit and that it was in the best interests of H.J. for custody to be granted to Respondents Dulaneys. (PA-148-154). Further review was denied by the Minnesota Supreme Court by Order dated September 30, 1993. (PA-155)

B. Petitioner's Failure to Raise The Federal Questions In the State Courts

Petitioner has failed to comply with the requirements of Rule 14.1.(h) of the Rules of the Supreme Court of the United States. Rule 14.1.(h) states:

> "(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent

> quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears... as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari..."

Petitioner does not specify the stage in the proceedings, either at the trial court, Minnesota Court of Appeals, or the Minnesota Supreme Court, at which he raised the federal questions he now asks this Court to review. There is no reference to the method or manner of raising them or to the way in which they were passed upon by those courts, nor does Petitioner quote or make specific reference to the places in the record where the matter appears. Petitioner has totally failed to comply with the requirement of the rule.

In referring to 28 U.S.C., Section 1257 (the statute which Petitioner claims

provides jurisdiction here) this Court in Webb v. Webb, 451 U.S. 493 (1981) stated:

> "That statute requires that in the state courts Petitioners have 'specially set up or claimed under the Constitution... of... the United States' that right which she now seeks to have this court enforce... This Court has frequently stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary...
>
> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the

record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Id. at 495-6.

Not only did Petitioner fail to comply with the technical requirements of Rule 14.1.(h), but he totally failed to present the federal questions he attempts to raise here at any stage of the state court proceedings in Minnesota. For convenient reference, Respondent has set forth in her appendix (hereinafter "RA-") to this brief the pertinent portion of Petitioner's brief to the Minnesota Court of Appeals wherein he set forth the legal issues he then raised. (RA-1-3) Also included in the appendix is Petitioner's entire (except the appendix) Petition to the Minnesota Supreme Court for review of the decision of the Minnesota Court of

Appeals. (RA-4-10) These documents conclusively show that these issues were not raised in the Minnesota courts.

This Court is without jurisdiction to address federal questions not raised in the state courts. The petition for writ of certiorari should be denied on this basis alone, and no further review by this Court should be required.

REASONS FOR DENYING WRIT

As noted, Petitioner did not raise the federal questions he now seeks to have this Court review at any stage of the state court proceedings. Nevertheless, Respondent will address the first three issues in the order that they were presented by Petitioner. This Respondent is not involved in the fourth issue.

1. Petitioner's due process rights were not violated by the consolidation of the CHIPS and custody proceeding.

Petitioner misstates the facts in his framing of this issue. The trial court in its September 27, 1991 order provided:

> "1. That the Custody Petition of Dulaneys (file no. F3-91-371) and the CHIPS proceeding in the matter of the welfare of H.J. (file no. J2-89-50162) may be and hereby are consolidated for future proceedings. (Emphasis added)
>
> 2. That an evidentiary hearing on the Petition of Custody of Dulaneys may be and hereby is granted, and the matter shall be expedited." (RA-36)

There was no intervention, but simply a consolidation of a custody and child protection (CHIPS) proceeding for hearing.

Petitioner has not presented a justiciable federal question. He makes reference to the Constitution and his rights, but fails to establish how his

First or Fourteenth Amendment rights have been violated. As the record amply demonstrates, the courts in Minnesota afforded Petitioner a full measure of due process in both the CHIPS action initially and later in the trial on the custody petition that was consolidated with the CHIPS case, which was then being reviewed by the court following its initial disposition.

The trial court, as later affirmed on appeal, was following established Minnesota procedure in consolidating both matters. Both matters had as their primary consideration the determination of, and protection of, the best interests of the child, H.J. Best interest of the child is the overriding consideration even in disputes between natural parents and a third person. In Re Custody of N.M.O., 399 N.W.2d 700, 703 (Minn. Ct. App. 1987).

Proceedings for permanent custody, such as Dulaneys' action here, may be maintained concurrently with a neglect and dependency (now CHIPS) proceeding. In Re the Custody of E.A.Q.D., 405 N.W.2d 262, 264 (Minn. Ct. App. 1987). In E.A.Q.D., the court determined that "the best interest of the child will best be served by the joinder of the contested issues in one court at one time." Id. at 265. A later Minnesota Supreme Court case, Durkin v. Hinick, 442 N.W.2d 148 (Minn. 1989), noted that "the guiding principal in all custody cases is the best interest of the child," in reaching its conclusion that a dependency and neglect petition would properly be consolidated with a petition for custody by a third party. Petitioner cites the more recent case, In the Matter of the Welfare of J.L.U., 450 N.W.2d 642 (Minn. Ct. App. 1990). In that case the court

noted that in appropriate cases, juvenile protection cases may be maintained concurrently with custody proceedings. The court stated:

> "Where concurrent juvenile protection and custody proceedings are pending, consolidation may be appropriate, and the facts of a particular case may justify the dismissal of juvenile protection proceedings, where an award of permanent custody will alleviate the temporary risk to the children." Id. at 644.

That is exactly what happened here. While Petitioner cited this case and quoted some language from it, he neglected to advise the court of the above language and the legal conclusion that consolidation is appropriate.

For some time Minnesota has permitted third parties to institute proceedings for

custody against natural parents with determinations based upon the welfare and best interest of the child. Jaroszewski v. Prestige, 249 Minn. 80, 81 N.W.2d 705 (1957). This right of third parties has been determined to include the right of foster parents to intervene in proceedings concerning their foster children, Weiler v. Lutz, 501 N.W.2d 667 (Minn. Ct. App. 1993), and even in such significant matters as termination of parental rights cases. In the Matter of the Welfare of C.J., 481 N.W.2d 861 (Minn. Ct. App. 1992). In Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971), the Minnesota Supreme Court discussed the test to be applied in such cases:

> "Thus, it would seem to be a fundamental rule of law that, all things being equal, as against a third person, a natural mother would

be entitled as a matter of law to custody of her minor child unless there has been established on the mother's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, ...; or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child." Id. at 630.

These third party actions, like this case, concern the welfare and custody of a child. The fact that a foster parent is involved in this case does not give rise to a federal question concerning Petitioner's constitutional rights as a natural parent. As stated in Leonard v. Mitchell, 473 F.2d 709 (2nd Cir. 1973):

"for it is beyond dispute that the

state has a substantial range of authority to protect the welfare of children... This power extends to the determination of parental custody and visitation rights." Id. at 713.

Petitioner, in the guise of alleged federal questions, is asking this Court to involve itself in a custody dispute. In Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982), this Court stated:

"the State's interest in finality is unusually strong in child-custody disputes... It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his

current 'home', under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions." Id. at 513-514.

The court here had established the Petitioner's incapacity by virtue of its initial CHIPS findings and subsequent review hearings, and thereafter, at the trial on Dulaneys' request for custody of H.J., determined that Petitioner was an unfit parent, and that it was in H.J.'s best interest to be in Dulaneys' custody. There is no argument set forth by Petitioner justifying this Court's prolonging the uncertainty of H.J.'s custody by granting the writ of certiorari. The mere fact that states

differ on the role that foster parents can take in custody matters does not create a justiciable federal due process or equal protection issue.

2. Petitioner's due process and equal protection rights as a biological father were not violated.

Essentially, Petitioner argues that he was denied procedural due process. While Petitioner discusses due process, he completely fails to set forth any equal protection arguments, other than the mere inclusion of that claim in the framing of his issue.

As concerns Petitioner's due process allegations, DCDHS did consider the Johnson family's religious beliefs in making the foster care placement. Court reviews properly substituted for the administrative review. There was no "qualified admission" to the CHIPS

petition. Petitioner admitted two of the three statutory grounds alleged. The court found no discrimination against petitioner, and none occurred. Consequently, there was no lack of due process, and no violation of Petitioner's due process rights.

3. **Petitioner's First Amendment rights to freely exercise his religious beliefs were not violated.**

Petitioner has attempted throughout this case to assert his religious beliefs, his right to hold those beliefs, and his right to exercise those beliefs freely as a basis for insisting on the return of his daughter, H.J., to his custody. This assertion had as its purpose the goal of derailing the trial court's inquiry and proper focus upon H.J.'s welfare and the protection of her best interest.

There is no dispute with the fact that with parental custody comes the ability to make decisions about a child's religious upbringing. Minnesota Statutes Section 518.003 Subd. 3 states: "(a) "Legal custody" means the right to determine the child's upbringing, including education, health care, and religious training." In Minnesota there is a presumption that a natural parent is a fit and suitable person to be entrusted with the care of his child and that, ordinarily, it is in the best interest of the child to be in the custody of his natural parent. In re Welfare of Clausen, 289 N.W.2d 153, 155 (Minn. 1980). However, "if the evidence as a whole clearly demonstrates that the best interest of the child demands a different disposition, the best interest of the child must prevail." In the Matter of the

Welfare of C.K., 426 N.W.2d 842, 847 (Minn. 1988). Thus parental rights, including rights to make religious decisions about one's children, are not absolute, as petitioner seems to be contending.

This court has long held, in oft-quoted language, that:

> "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S. Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitation... The state as parens patriae may restrict the parents control... Its authority is not nullified merely because the parent grounds his claim to control the

> child's course of conduct on religion or conscience... It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious convictions."

Prince v. Massachusetts, 321 U.S. 158, 166, 7 (1944).

In this case the state took action through its CHIPS proceeding to provide immediate protection for H.J. in order to ensure that she would no longer be subjected to physical and emotional abuse, and to ensure that she would be provided with adequate nutrition. Rather than remain in Minnesota to work on reunifying with his children, Petitioner left the

state, and returned only for short periods of time when some of the court hearings were held. Petitioner did not comply with the court's CHIPS orders regarding his counseling obligations. During this same period of time, his now deceased ex-wife, remained in Minnesota and worked towards reunification. Petitioner returned to Minnesota only after the tragic deaths of his ex-wife and his older daughter. Given Petitioner's failure to rehabilitate himself and the continued deterioration of his relationship with H.J., even after his return, H.J. would have been left without appropriate permanent custodial care had the Dulaneys not sought to provide that care by seeking to be awarded custody of her. It is apparent from a review of the extensive trial court findings and the decisions of the appellate courts in Minnesota that none of Petitioner's

protestations at trial, nor the issues he raised on appeal, changed the conclusion that he was not fit to parent H.J. Petitioner's assertion that his First Amendment constitutional rights have been violated does not justify a different conclusion.

CONCLUSION

Petitioner did not raise the federal questions here presented in the Minnesota courts, nor has he complied with the rules of this Court requiring a specification of the stage at the state court proceedings where these questions were raised. Petitioner does not now spell out any federally justiciable questions before this Court. The petition for writ of certiorari should be denied.

Dated: January 27, 1994

Respectfully submitted,

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[Legal issues set forth in Petitioner's brief to the Minnesota Court of Appeals]

LEGAL ISSUES

I. Did the Court err in: failing to dismiss the CHIPS Petition before trial based upon the failure of Dodge County to comply with applicable statutes and regulations; failing to refer the entire proceedings prior to trial to Maui County, the jurisdiction of the Minor's sole surviving parent; permitting the custody petition of the foster parents to be heard jointly with the CHIPS proceeding; failing to limit testimony to issues involving the CHIPS proceeding and family placement with Appellant, precluding evidence relating to Respondents' custody Motion; failing to make Findings as required in a CHIPS proceeding under Minn. Stat. 260.191, subd. 1; and granting the foster parents custody despite an insufficient showing of evidence to overcome the father's natural custodial preference. In post-trial motions, did the trial Court err in: denying Appellant's Motion to modify the requirement that visitation be supervised, and failing to compel Dodge County Human Services to provide Appellant with a plan for reunification with his daughter H.J.?

Trial Court held: In the negative.

II. Did the Court err in: denying the intervention request by H.J.'s paternal grandparents seeking her

custody; and in post-trial motions, declining to establish their visitation schedule.

Trial Court held: In the negative.

III. Did the Court err in permitting into evidence remote in time, consisting of hearsay testimony by Appellant's deceased wife Lucy, deceased daughter Joyfull, and surviving daughter H.J., without advance notice under Minn. Stat. 595.02, subd. 3 and 260.156 of any intent to present hearsay evidence by such witnesses?

Trial Court held: In the negative.

IV. Did the Court err in appointing the "CHIPS" Guardian as Guardian Ad Litem in the custody case, despite an obvious adversarial relationship demonstrated in the CHIPS proceeding and initial appointment as Trustee in the related wrongful death matter?

Trial Court held: In the negative.

V. Did the trial Court err in ordering withdrawal of the appointment of Appellant's counsel for "all post-trial proceedings" in the trial Court?

Trial Court held: In the negative.

VI. Did the trial Court err in: vacating the appointment of Appellant, natural father of sole surviving child H.J., as trustee in a wrongful death action, and appointing in his stead foster

parent-Respondent Mark Dulaney, and vacating sua sponte its Order filed December 17, 1992 which had not been appealed, and for which the time for appeal had expired?

Trial Court held: In the negative.

[Petitioner's Petition the Minnesota Supreme Court for review of the Decision of the Minnesota Court of Appeals]

STATE OF MINNESOTA

IN SUPREME COURT

In Re the Custody of:	PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS
H.J.,	
a Minor,	
----------	APPELLATE COURT CASE NUMBERS:
In the Matter of the Appointment of a Trustee for the next-of-kin of Lucy Kathleen Johnson and Joyfull Johnson,	C4-92-2288 C1-93-508 C3-93-509
	DATE OF FILING OF COURT OF APPEALS DECISION:
Decedents.	August 3, 1993

In Re the Guardianship of:

H.J., Ward.

TO: The Supreme Court of the State of Minnesota:

The Petitioner, Jay Johnson, requests Supreme Court review of the above-entitled

decision of the Court of Appeals upon the following grounds:

1. Statement of legal issues and their resolution by the Court of Appeals.

I. Did the Court err in: failing to dismiss the CHIPS Petition before trial based upon the failure of Dodge County to comply with applicable statutes and regulations; failing to refer the entire proceedings prior to trial to Maui County, the jurisdiction of the Minor's sole surviving parent; permitting the custody petition of the foster parents to be heard jointly with the CHIPS proceeding; failing to limit testimony to issues involving the CHIPS proceeding and family placement with Appellant, precluding evidence relating to Respondents' custody Motion; failing to make Findings as required in a CHIPS proceeding under Minn. Stat. 260.191, subd. 1; and granting the foster parents custody despite an insufficient showing of evidence to overcome the father's natural custodial preference. In post-trial motions, did the trial Court err in: denying Appellant's Motion to modify the requirement that visitation be supervised, and failing to compel Dodge County Human Services to provide Appellant with a plan for reunification with his daughter H.J.?

Trial Court held: In the negative.

II. Did the Court err in: denying the intervention request by H.J.'s paternal grandparents seeking her custody; and in post-trial motions, declining to establish their visitation schedule.

Trial Court held: In the negative.

III. Did the Court err in permitting into evidence remote in time, consisting of hearsay testimony by Appellant's deceased wife Lucy, deceased daughter Joyfull, and surviving daughter H.J., without advance notice under Minn. Stat. 595.02, subd. 3 and 260.156 of any intent to present hearsay evidence by such witnesses?

Trial Court held: In the negative.

IV. Did the Court err in appointing the "CHIPS" Guardian as Guardian Ad Litem in the custody case, despite an obvious adversarial relationship demonstrated in the CHIPS proceeding and initial appointment as Trustee in the related wrongful death matter?

Trial Court held: In the negative.

V. Did the trial Court err in ordering withdrawal of the appointment of Appellant's counsel for "all post-trial proceedings" in the trial Court?

Trial Court held: In the negative.

VI. Did the trial Court err in: vacating the appointment of Appellant, natural

father of sole surviving child H.J., as trustee in a wrongful death action, and appointing in his stead foster parent-Respondent Mark Dulaney, and vacating sua sponte its Order filed December 17, 1992 which had not been appealed, and for which the time for appeal had expired?

Trial Court held: In the negative.

2. Statement of the criteria of the rule relied upon to support the petition.

Supreme Court review of this matter is essential to correct an unjust decision which effectively transformed a minimal CHIPS Petition into a termination of parental rights case. A decision by the Supreme Court will help develop, clarify, and harmonize the law in CHIPS proceedings. This case calls for the application of a new principle which precludes hearing or joinder of third party child custody petitions until commencement of termination of parental rights proceedings. Resolution of the question presented has statewide impact, and

is likely to recur unless resolved by this Court.

3. Statement of the case.

Petitioner is the natural father of a 10-year-old H.J., sole family survivor of the fatal car crash which killed Petitioner's former wife and 12-year-old daughter, Joyfull, on July 6, 1991.

A "CHIPS" proceeding was commenced against Petitioner and his wife on November 9, 1989, resulting in his qualified admission to a portion of the allegations. Petitioner thereafter returned to his native State of Hawaii to comply with Social Services' requests and prepare his home for reunification with the children. In February, 1991, both children returned to Hawaii for a visit and desired to remain there for reunification with their father. Respondent Dodge County refused their request, despite the initial urging by

Respondent foster parent Diane Dulaney that such was in the best interest of the children.

Thereafter, the tragic accident in July, 1991 took the lives of Petitioner's former wife and their minor child, Joyfull. Petitioner immediately came back from Hawaii to Minnesota, seeking return of H.J.'s custody to him in Hawaii. Despite the Court's declared intent to reunite father and daughter, and to refer the case to Maui County for any further necessary proceedings, the Court permitted the foster parents to intervene with a Petition for permanent custody, which Petition was ultimately granted after 16 days of trial.

4. A brief argument in support of petition.

This case initially arose out of the voluntary placement of Petitioner's daughters as Petitioner and his

schizophrenic wife were having difficulties in their marriage. After voluntary placement, a CHIPS Petition was brought against both Petitioner and his now deceased wife. Minimal concerns were raised concerning Petitioner, with the serious concern focusing on his wife's manic depressive behavior.

The trial court stated that it could not "find that Human Services...had a plan to reunite the children with their father, Jay Johnson, and made little, if any effort in that direction... (A.125)", and also that Petitioner "has in essence followed the court Orders in this case (A. 192). The Court by pretrial Order had determined that this case was appropriate to transfer to Hawaii. The County Attorney also recommended that disposition, both before and after all trial proceedings were concluded, However, after hearing all the

trial testimony, Petitioner's sole surviving daughter was removed permanently from his custody.

The underlying reason for denying Petitioner custody of his own child was that a lengthy time of over two years had passed between his initial voluntary placement and the dispositional hearing. However, the cause of this delay included both the Human Services' Department failure to make reasonable efforts to reunite Petitioner with his daughter, and also the third party foster parents' petition for custody.

This case confirms the need for application of a new Statewide policy, preventing foster parents from intervening in CHIPS proceedings to wrongfully remove children from their natural parents. Resolution of this issue has potential statewide impact. Unless this question is now resolved, it is likely to recur with

continuing inconsistent and unjust results. For these reasons, Petitioner seeks an order granting review of the decision of the Court of Appeals.

DATED: August 31, 1993

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